

1 Kathleen E. Brody, No. 026331  
2 OSBORN MALEDON, P.A.  
3 2929 North Central Avenue  
4 21st Floor  
5 Phoenix, Arizona 85012-2793  
6 (602) 640-9000  
7 [kbrody@omlaw.com](mailto:kbrody@omlaw.com)

8 Attorneys for Arizona Attorneys for Criminal Justice

9  
10 IN THE SUPREME COURT OF THE STATE OF ARIZONA  
11  
12

13 In the Matter of:

No. R-14-0031

14  
15 Petition to Amend Rule 32.2(b),  
16 Arizona Rules of Criminal Procedure

**COMMENT OF ARIZONA  
ATTORNEYS FOR CRIMINAL  
JUSTICE REGARDING  
PETITION TO AMEND RULE  
32.2(b), ARIZONA RULES OF  
CRIMINAL PROCEDURE**

17 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona  
18 Attorneys for Criminal Justice (“AACJ”) submits the following comment to the  
19 above-referenced petition.

20 AACJ, the Arizona state affiliate of the National Association of Criminal  
21 Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the  
22 criminally accused and to those attorneys who defend the accused. AACJ is a  
23 statewide not-for-profit membership organization of criminal-defense lawyers,  
24 law students, and associated professionals dedicated to protecting the rights of the  
25 accused in the courts and in the legislature, promoting excellence in the practice  
26 of criminal law through education, training, and mutual assistance, and fostering  
27 public awareness of citizens’ rights, the criminal-justice system, and the role of  
28 the defense lawyer.

AACJ supports amendment of this rule. Petitioner, an inmate in the  
Arizona Department of Corrections, is proposing the very same amendment to  
Rule 32.2(b) that was suggested in 2012 by both AACJ and the State Bar of

1 Arizona in their respective comments to Rule Change Petition R-11-0016. This  
2 rule change is needed to fix a glitch in Rule 32 that allows a court to act without  
3 jurisdiction and then prevents the court, on discovering the mistake, from  
4 vacating its action.

5 A judgment or order is void, and not merely voidable, if the court that  
6 entered the order lacked jurisdiction: 1) over the subject matter, or 2) over the  
7 person involved, or 3) to render the particular judgment or order entered. *State v.*  
8 *Cramer*, 192 Ariz. 150, 153 ¶ 16 (App. 1998). “The issue of jurisdiction may be  
9 raised at any time.” *State v. Flores*, 218 Ariz. 407, 409-10 ¶ 6 (App. 2008); Ariz.  
10 R. Crim. P 16.1(b). Subject-matter jurisdiction can never be forfeited or waived,  
11 and defects in subject-matter jurisdiction must be corrected, even if the error was  
12 not raised in a lower court. *State v. Chacon*, 221 Ariz. 523, 526 ¶ 5 (App. 2009)  
13 (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002)). Because subject-  
14 matter jurisdiction can never be waived, even after conviction, requiring a  
15 petitioner to provide in a successive notice of post-conviction relief the reasons  
16 for raising the issue in an untimely manner is both improper and unlawful.

17 A recent opinion of the Court of Appeals demonstrates the necessity for  
18 this rule change. *State v. Espinoza*, 229 Ariz. 421 (App. 2012). In that case,  
19 Espinoza was adjudicated delinquent by the juvenile court on one count of  
20 attempted molestation of a child. The juvenile court never ordered him to register  
21 as a sex offender as a condition of this adjudication. After he turned eighteen,  
22 Espinoza was indicted in 2003 in Pima County Superior Court on one count of  
23 burglary in the third degree. He eventually pleaded guilty to one count of criminal  
24 damage and was sentenced to probation. As a condition of his probation,  
25 however, the superior court ordered Espinoza to register as a sex offender,  
26 because the presentence report stated that it appeared that Espinoza never  
27 registered as a sex offender, and the court, prosecutor, and defense attorney all  
28

1 presumed that he was required to register without anyone bothering to check on  
2 the veracity of the claim.

3 The criminal-damage case, with its erroneous order to register, then served  
4 as the basis to arrest and charge Espinoza in Pima County in 2004 for a “failure to  
5 register.” A.R.S. § 13-3821. Defense counsel in that case also failed to see the  
6 mistake of fact in the criminal-damage case; Espinoza pleaded guilty and endured  
7 a prison sentence. Upon release, the Pima County failure-to-register case resulted  
8 in a Maricopa County failure-to-register case for which Espinoza was also  
9 incarcerated after pleading guilty, all without anyone noticing the problem with  
10 the underlying order. Espinoza spent more than four years in prison for offenses  
11 he never committed.

12 Upon his release from prison on the Maricopa County conviction, Espinoza  
13 was charged again in Pima County for failing to register. This time, his counsel  
14 discovered the error and the state voluntarily dismissed the prosecution.

15 In 2010, Espinoza filed a petition for post-conviction relief on his 2003  
16 criminal-damage conviction, pursuant to Rule 32. In that petition, Espinoza  
17 argued that he was “actually innocent,” not of criminal damage, but of the  
18 requirement that he register as a sex offender. The trial court denied relief,  
19 holding that: 1) Espinoza’s claim was precluded as untimely, and 2) his claim of  
20 “actual innocence” of the registration requirement did not fall under any  
21 exception to the preclusion requirements of Rule 32. On review, the Court of  
22 Appeals upheld the trial court’s ruling, stating that Espinoza’s claim of “actual  
23 innocence” of the registration requirement was precluded as untimely because  
24 Rule 32.1(h) provides relief only when a defendant is actually innocent of the  
25 underlying offense, and not when a defendant has been sentenced unlawfully.  
26 *Espinoza*, 229 Ariz. at 423 ¶¶ 7-9.

27 New counsel then sought Rule 32 relief to vacate the Pima County failure-  
28 to-register, which seemed to be the epicenter of the unlawful convictions.

1 Espinoza sought relief on the ground that he was actually innocent (Rule 32.1(h)),  
2 as claims under Rules 32.1(a), (b), and (c) were precluded. He argued, among  
3 other things, that the trial court in the criminal-damage case never had the  
4 authority to order registration; consequently, he was legally and factually  
5 innocent, and his conviction in the Pima County failure-to-register case should be  
6 vacated. While this issue was described in terms of authority, power, and  
7 jurisdiction, it was ultimately determined that the order to register in the criminal-  
8 damage case was merely voidable and not void, and all appellate courts denied  
9 relief. Espinoza then sought Rule 32 relief in the criminal-damage case raising  
10 similar arguments, but that case was in a far weaker procedural position due to its  
11 age. Unsurprisingly, courts at all levels denied relief to Espinoza. *Id.* ¶ 10.

12       Upon being charged yet again in Pima County in 2011 with failing to  
13 register, the prosecution this time insisted on proceeding with the case. The trial  
14 court not only dismissed the prosecution, however, but also found that the  
15 original order to register was void, and therefore all successive prosecutions of  
16 Espinoza were also void. The trial court further ordered that Espinoza shall no  
17 longer be required to register. *Id.* at 423-24 ¶¶ 11-12. The State appealed the  
18 ruling and the Court of Appeals published its opinion that the trial court acted  
19 properly. The Court of Appeals held that the superior court in 2003 lacked subject  
20 matter-jurisdiction to order Espinoza to register as a sex offender because it was  
21 using the juvenile adjudication as a basis for making the order, and as a  
22 consequence, the order requiring him to register was void. *Id.* at 428-29 ¶ 31. The  
23 court also held that Espinoza's convictions in 2004 and 2008 for failing to register  
24 as a sex offender were founded entirely on his violation of the void registration  
25 order in 2003, and that "therefore, those convictions are likewise invalid and  
26 ineffective for any purpose." *Id.* at 429 ¶ 32. Finally, the court concluded that  
27 "[t]he trial court in the instant case did not err in finding the original order void or  
28

1 in concluding Espinoza not only has no duty to register as a sex offender in the  
2 future, but never has had such a duty.” *Id.* ¶ 33.

3 Rule 32 is a vital tool for redressing wrongful convictions, and the  
4 proposed rule change will insure that petitioners like Espinoza receive justice  
5 when it is undeniable that justice is deserved. Because Rule 32 purports to be an  
6 exhaustive list of all potential claims on post-conviction relief and has strict rules  
7 governing preclusion, many successive petitions are barred by preclusion  
8 regardless of their merit. Furthermore, trial courts routinely misapply preclusion  
9 by finding claims of ineffective assistance of counsel barred because appellate  
10 counsel did not raise the underlying claim (even when the ineffective-assistance  
11 claim is also brought against appellate counsel). Division Two of the Court of  
12 Appeals, as a matter of practice, grants review of every petition for review and  
13 regularly notices these errors, but Division One grants review rarely. This means  
14 that, in practice, the trial court is often the first *and* last court to review a petition  
15 for post-conviction relief.

16 By exempting from preclusion claims that a court acted without subject-  
17 matter jurisdiction, the rule would be made consistent with the law, and confusion  
18 such as that apparent in Espinoza’s case will be significantly reduced.

### 19 CONCLUSION

20 For these reasons, AACJ respectfully requests that this Court grant the  
21 petition to amend Rule 32.2(b) so that a claim for post-conviction relief brought  
22 under Rule 32.1(b) is not subject to preclusion.

23 DATED: May 19, 2015.

24 ARIZONA ATTORNEYS FOR  
25 CRIMINAL JUSTICE

26 By /s/ Kathleen E. Brody

27 Kathleen E. Brody  
28 Osborn Maledon, P.A.  
2929 N. Central Ave., 21st Floor  
Phoenix, AZ 85012

1 This comment e-filed this 19th day  
2 of May, 2015 with:

3 Supreme Court of Arizona  
4 1501 West Jefferson  
5 Phoenix, AZ 85007-3329

6 Copies of this Comment  
7 mailed this date to:

8 Robert L. Jaramillo 039278  
9 ASPC - Eyman Complex  
10 Browning Unit 4-K-55  
11 PO Box 3400  
12 Florence, AZ 85132

13 /s/ Patricia D. Palmer

14 6090248

15

16

17

18

19

20

21

22

23

24

25

26

27

28